IN THE

Supreme Court of the United States

October Term, 1976
No. 76-62

BENJAMIN EISENBERG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CASES CITED

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Benjamin Eisenberg, respectfully requests that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals, for the Second Circuit entered on or about June 17, 1976, affirming a judgment of the United States District Court for the Southern District of New York, entered on or about March 9, 1976, convicting petitioner after a jury trial of the crimes of false declarations made before a grand jury and obstruction of justice, in violation of Sections 1623 and 1503, of Title 18, United States Code. As a consequence of these convictions, the petitioner was sentenced to a jail term of eighteen (18) months, and fined the sum of $1,500.00 under each of the four (4) counts, aggregating $6,000.00.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without opinion.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was rendered from the bench on June 17, 1976.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1), and under Rule 19(1) of the Rules of the supreme Court.

QUESTIONS PRESENTED

A. Could the petitioner have been found guilty under Title 18 U.S.C., Section 1623 and Section 1503?

B. Was there sufficient evidence to support the verdict under each count in the indictment in that the questions propounded before the grand jury when the petitioner appeared there, were indefinite and invited the petitioner's answers?

C. Did the court deny the petitioner the effective assistance of counsel when, at the close of the day of trial, it afforded counsel merely ten (10) minutes to discuss with his client whether the petitioner should testify, and gave him an additional ten (10) minutes to prepare for summation, denying counsel's request to adjourn the matter for the following day?

THE PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES OF CRIMINAL PROCEDURE RELIED UPON

Amendment V — Due Process: " . . . nor to be deprived of life, liberty or property, without due process of law . . . "

STATUTES

Title 18, Section 1503 Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, magistrate, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000. or imprisoned not more than five years, or both.

Title 18, Section 1623 False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material

declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this sub-section that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall

bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

Prior to being questioned, the petitioner was informed only that there was a grant of immunity and the prosecutor told the petitioner what the immunity purported to be (Government's Exhibit 2, 14).*

Next the government called Charles Fink who testified he was a member of the grand jury that the petitioner appeared before on May 6, 1975 (15). He administered the oath to the petitioner (16). The scope of the grand jury quest was whether the petitioner possessed information that he or third parties made loans bearing high interest rates and whether force was used to collect those loans (18).

On cross examination this witness thought that the petitioner was a "target" (19).

On re-direct examination and also being questioned by the judge, the witness explained that the expression "target" meant to him that the petitioner's name was mentioned by two witnesses (19).

On re-cross examination the witness could not answer questions as to whether the petitioner was asked whether he was a "shylock" or "bookmaker" and the witness responded that he could not remember because "it's so long ago" (21, 22).

Kenneth Giel, a special agent was next called by the government to participate in a dialogue with the prosecutor so as to enact the scene, that is the petitioner's appearance before the grand jury, and the interrogation of the petitioner, as represented by the script of the minutes of that session (Government's Exhibit 2, 22, 24-27).

*This refers to the pagination of the appendix, in the court below.

The intensity of the government's case next was stepped up with the calling of Michael Dubler (27). Dubler was a salesman. He previously met the petitioner 3-1/2 years before the trial at a store where he was employed located at 3rd Avenue and 60th Street and called Churchill's (28). The meeting was arranged by a bookmaker called "Bernie", and the occasion was that the witness desired a loan to pay gambling debts (28, 29). The petitioner introduced himself as "Benny" (29, 30). The witness explained that he wanted $3,000.00 but ultimately a loan of $1,000.00 was made because the witness had no collateral. The terms of the loan were $120.00 weekly for ten (10) weeks (32). At the end of that week a third party stating that he was "Benny's" friend came to collect (34).

The witness never knew the third party by name, but asserted it was the petitioner's brother (34, 35). After 4 to 5 weeks this witness couldn't pay the loan; he also joined Gambler's Anonymous (35, 36).

Dubler never knew or received the petitioner's telephone number, nor did he know where the petitioner was located (36). Upon his inability to repay he claimed that the petitioner threatened and cursed him (37). The petitioner allegedly told him that there would be a penalty (37). He made one further payment (39). Ultimately he settled for payments of $50.00 monthly (41). Furthermore, the petitioner never had the witness' telephone number. All in all on the $1,000 loan the witness repaid $800.00 (42). He never told the petitioner that his name was "Jack", giving the petitioner the name "Mike" (43).

On cross examination Dubler related that the petitioner never knew his last name, telephone number or home address; that "Bernie" a bookmaker introduced the witness to the petitioner. That the witness dealt with other

bookmakers (44, 45). Nor did this witness know "Bernie's" last name (46). In transacting the petitioner never asked the witness to sign a note or asked to examine his auto license or registration (46). "Bernie" told the petitioner that the witness was "okay" (47). The witness admitted that the petitioner may have made a loan to him because of "Bernie" (47). The witness admitted that he couldn't recall the approximate date or exact date that the loan was made. He stated that he couldn't recall because the transaction was about 3-1/2 years prior to the trial. Upon being further questioned he stated that the loan could have been made in late 1971 or 1972 (47). Questioned as to the time of the year or the month, the witness stated he thought it was the "fall" (48).

Although the witness was frightened, he never went to the authorities (49, 50). He was in debt to others and ultimately left New York for a period of three (3) months (53, 55). When he returned he never saw the petitioner nor did the petitioner ever attempt to collect the debt (57).

Dubler's grand jury testimony disclosed that he told the grand jury that the petitioner never threatened to shoot him (58). He did tell the grand jury that he had a heated conversation with the petitioner but that he couldn't answer because of the lapse of time (59). He also admitted to the grand jury that when talking to a federal agent he might have exaggerated (60, 61). Questioned again he admitted that he told the grand jury that the petitioner never threatened to kill him (63, 64).

The second witness called by the government was Robert Aronowitz (66). This witness gave his penal biography which consisted of being convicted upon his guilty plea of bribery in 1973. The bribery involved an Internal Revenue Service agent. He received an 18 months suspended sentence as a consequence of his conviction (67, 68, 98, 100). He also cooperated with the government and received a sum of $400.00 in March 1971 in connection with his cooperation (69).

He met the petitioner eight (8) years prior to trial through one "Phil" (70). The petitioner initially called him on the telephone at his place of business at 38th Street in Manhattan. The witness was a garment contractor (69, 70). In that initial conversation he told the petitioner that he needed money. A few days later the petitioner telephoned him and ultimately came to his office (70-72). There the witness told the petitioner he needed $30,000 for his business (72, 73). The petitioner told him the cost of the loan would be $600.00 weekly as interest (73, 74). The petitioner also told him that the witness didn't have to repay the loan at any fixed time (74). Later the witness met the petitioner at 37th or 38th Street and 7th Avenue and there the petitioner gave him an envelope which contained the $30,000 (75-77). A few days after this, the petitioner met the witness to have him sign a note which was done at a nearby bank. This was after the first payment (77-79). After another payment of $600.00 the petitioner's brother thereafter made the collections over a four (4) year period (80, 81). The witness claimed that all in all he paid over $125,000 on the loan (81). Nevertheless he still owed the principal amount of $30,000 (83).

When the witness defaulted he explained to the petitioner that his business was slack (84, 85). Because his business fell off, he thereafter moved to an office at 37th Street in Manhattan (85). At that location, the petitioner upon not being paid, demanded the payment and the witness explained that his business was bad (86). The witness and the petitioner made a compromise and the

payments were reduced to $50-$70 weekly. The petitioner accepted this although reluctantly (87, 88).

Questioned further Aronowitz explained that he arranged with the petitioner to meet him at a bar or the street to make any payments (88, 89). He did have the petitioner's home telephone number and did call him in the past (89, 90). The witness moved a third time to an office on 36th Street. At that place the petitioner's brother appeared to collect the payments (90, 91).

About one and one-half years before the trial he closed the third location (91). A year prior to the trial he accidently met the petitioner and told him he was planning to go back into business, telling the petitioner that he would contact him (92, 93).

Aronowitz admitted the petitioner never called him at his residence (93). However the witness also testified he never used the name "Jack" but did tell the petitioner his last name so as to identify himself (93, 94).

He borrowed other monies from the petitioner also (94). This was for a dress business in Rockland County. He never repaid those monies to the petitioner (95, 96).

On cross examination he admitted that he met the petitioner through a bookmaker (96, 105). The $30,000 loan was made in 1967 or approximately 8 years before the trial (97, 100). At the time he bribed an Internal Revenue Service agent he was still paying the loan (98, 100). He never asked the petitioner for a copy of the note that he signed and testified to previously on direct examination (101). Nor did he ever engage in any transactions with the petitioner prior to the $30,000 loan (102). At the time he got the loan he was buying automobiles every two years (103-104). He denied wagering with bookmakers (105). He

admitted that the petitioner never pressured him for any payments (105).

When the $30,000 loan was made to him, there were no other parties present, and similarly when he made payments there were no other parties present except the collector (106, 107). Nor did this witness ever ask for a return of the note even though he paid all in all about $125,000 (107, 109). Aronowitz admitted that he never told his accountant or attorney about the loan (109). At the time he initially borrowed the $30,000 he had some debts but he couldn't recall the specifics of those debts. He never attempted to get a loan from a bank (110). Nor did the note have a date or a specification of the rate of interest (111, 112). Furthermore, while he was in debt on the initial loan of $30,000, the petitioner gave him an additional $7,000 (114). As to this transaction there was no note (114, 115). Nor did the transaction involving $7,000 contain a fixation of interest or a date for the return of that (115, 116). Aronowitz did say that in regard to the $7,000 transaction the petitioner asked for an interest in the business. This $7,000 was never repaid (116). When he was interviewed by a federal agent he couldn't remember whether he told that agent that the petitioner wanted to settle the debt for $15,000. Furthermore he told the agent that he only borrowed $7,000 from the petitioner (118). He couldn't recollect whether he told the FBI that he borrowed $40,000 from the petitioner (119). He readily admitted that the petitioner never pressured him (120).

REASONS FOR GRANTING THE WRIT
POINT I

THE CONVICTION UNDER 18 U.S.C. 1503 SHOULD BE SET ASIDE BECAUSE THE ACTS ATTRIBUTED TO THE PETITIONER WERE NOT WITHIN THE SCOPE OF THAT SECTION; AND ALTERNATIVELY, BOTH SECTIONS CANNOT CO-EXIST IN THE CONTEXT OF THIS CASE

It would seem that the Supreme Court of the United States has assigned as a ground for the granting of certiorari that there is a conflict among circuits (Rule 19 [1] [B]).

Pre-existing 18 U.S.C. 1623 was 18 U.S.C. 1503 the statute underlying the 5th count of the indictment. Petitioner advances the argument on the theory that while the court recognized that 18 U.S.C. 1621 and 1503 were distinct and could support separate findings of guilt, there is still an open question whether the evasive testimony as to the failure of recollecting as well as the alleged false testimony involved in the false declarations counts, could be the basis for the conviction under the count based on Section 1503. In charging the jury as to the 5th count, the court charged the jury could find the petitioner guilty if he gave "false or evasive answers" (193). The trial jury was further instructed that the 5th count would lie if there was a "concealing from a grand jury information which is relevant . . . " (194).

In *U.S. v. Cohen*, 452 F. 2d 881 (Cir. 2d, 1971) cert. denied, 405 U.S. 975, the facts disclosed that when the defendant was before the grand jury he was presented with

a writing. He stated he knew nothing about this writing. It so happens he gave that writing to a third party, telling the third party the meaning of the writing. That court held that Section 1503 was violated by the intentional concealment of knowledge. That court distinguished the acts prohibited by the general perjury statute 18 U.S.C. 1621. The gravaman of the offense under Section 1503 it was held was the deliberate concealment not falsehood. It was further argued that to allow the prosecution to proceed under Section 1503 would help avoid the corroboration required in the general perjury statute 18 U.S.C. 1621. It is now suggested to this court that no corroboration is required under Section 1623.

However, in *U.S. v. Essex*, 407 F. 2d 214 (Cir. 6th, 1969) the appellant was convicted for juvenile delinquency based on a violation of Section 1503. Upon appeal it was reversed. The basis of the charge was that the appellant, an infant, filed a perjurious affidavit in court in support of a motion for a new trial in an earlier case. The affidavit alleged that the appellant had sexual intercourse with members of the jury in regard to the other case while the jury was sequested. The court held that Section 1503 was the product of the laws involving contempt and further held that false testimony alone would not constitute contempt without the presence of the additional element of obstructing justice. It was further held that the falsity of the appellant's statements established that there was no obstruction of justice remarking that the appellant was guilty of perjury. On page 218 it was stated in part involving the closing phrase of Section 1503 that:

> ". . . the general clause at its end, moreover must be read to embrace only acts similar to those mentioned in the preceding specific language . . . Neither the language of Section

> 1503 nor its purpose make the rendering of false testimony alone an obstruction of justice. If appellant committed any offense at all, it was the perjury charged in the information against him."

In *U.S. Rosner*, 352 F. Supp. 915 (D.C.N.Y., 1972), a conflict was noted between the courts of the Second Circuit and the other Circuits in regard to the purpose and theory underlying the construction of Section 1503, it being noted that the other courts concluded that section 1503 is aimed only at activity of an intimidating nature against persons involved in the judicial process.

It is also argued that in effect, the petitioner was "trapped" because the prosecutor did not act fairly by advising the petitioner that his activities were known or that there were witnesses who would contradict his assertions before the grand jury. Counsel recognizes that in the 2nd Circuit that argument may not be recognized. See *U.S. v. Camporeale*, 515 F. 2d 184 (Cir. 2d 1975). That case held that the prosecutor need not inform a witness of any independent proof in relation to the subject matter of the investigation, but on page 189 of that opinion the court also recognized that the prosecutor in that case did advise the witness that he was under surveillance for a long period of time. So also in *U.S. v. Del Torro*, 513 F. 2d 656 (Cir. 2d, 1975) at page 665 the witness there was warned before the grand jury after he testified that he might be subject to a perjury charge. In *U.S. v. Jacobs*, slip opinion Circuit Court of Appeals, Second Circuit, February 24, 1976, it was indicated there may not be a duty on the part of a prosecutor to divulge what evidence was in the possession of the prosecutor that could contradict the witness' testimony. It is now contended that this issue should be re-explored because of a recent holding in *U.S. v. Mandujano*, Supreme Court of the United States, No. 74-754,

Criminal Law Reporter, May 19, 1976, Volume 19 at page 3087 where it was held that the commission of perjury cannot be excused by claiming the constitutional privilege against self-incrimination under the 5th Amendment. The court was unanimous as to that theory. In that case, the basic issue was whether a grand jury witness was entitled to be advised of his right of counsel and right of silence as provided for in *Miranda v. Arizona*, 384 U.S. 436. The court held that the witness was not entitled to such warnings; that perjury cannot be committed because the government failed to observe a constitutional mandate applicable in other contexts. However, on page 3093 of 19 Criminal Law Reporter, the following was stated:

> "The fact that here the grand jury interrogation had focused on some of respondent's specific activities does not require that these important principles be jettisoned; nothing remotely akin to 'entrapment' or abuse of process is suggested by what occurred here . . ." (Internal citations omitted).

It is respectfully submitted that *Mandujano* thus leaves open the question as to whether a witness before a grand jury can be entrapped within the context of the facts of this case.

POINT II

THE PETITIONER'S GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT AS TO COUNTS 1, 2 AND 3 CHARGING FALSE DECLARATIONS UNDER 18 U.S.C. 1623

The indictment in the surviving false declaration counts, numbers 1, 2 and 3, may be reduced to the following. The

first count alleged that the petitioner said that if the loans were not paid, he forgot about them or let them lapse; that he didn't remember names and that he didn't threaten anybody. As to the issue of date of the loan, the prosecution's witness Dubler could not remember any too well and had a memory lapse (47). As to threats, Aronowitz testified that the petitioner never threatened him (120). In his grand jury testimony, Dubler indicated that the petitioner *never* threatened to kill him (63, 64). It is respectfully submitted that this statement before the grand jury was substantive evidence, See Rule 801 (d) (1) of the newly adopted Federal Rules of Evidence; see also *U.S. v. DeSisto*, 329 F. 2d 929 (Cir. 2d, 1963).

Similarly in regard to the second count, that dealt with a statement by the prosecutor that the petitioner "must know their last names." This was not questioning the petitioner but conducting a running debate with the petitioner. It was an argument. Furthermore, as the recital of facts shows Dubler didn't know "Bernie's" (the bookmaker" last name (46)). Furthermore when the petitioner stated that in "his business nobody gives you his last name" Dubler amply confirmed this for Dubler admitted that he never knew the last name of the petitioner, his telephone number or his address (45, 46).

Count 3 also alleged among other things, that the petitioner couldn't recollect the last name of the person he loaned over $500.00 naming that person by his first name, "Jack."

Section 1623 requires no corroboration. However the pitfalls of a perjury prosecution where the court considers oath against oath in a prosecution for false declarations all that has to be shown is oath against oath.

In regard to the failure of the petitioner to recollect it is respectfully submitted there was absolutely no evidence to

show that this was a misrepresentation of a state of mind or that he could collect. See *U.S. v. Clizer*, 464 F. 2d 121 (Cir. 9th, 1972) Cert. Denied 409 U.S. 1086, 410 U.S. 948. On page 125 the court stated that one of the counts in the indictment on review had to be dismissed because:

> ". . . The record contains no direct evidence that Clizer remembered . . . episode at the time he testified before the grand jury. In fact, there is little, if any, circumstantial evidence to show that Clizer must have remembered the incident . . . The only circumstantial evidence that even tends to show that the incident must have been remembered by Clizer is testimony given by . . . , an acquaintance of Clizer, and an active participant . . . , who became a government informer shortly after the occurrence of the fires that was the subject of the grand jury investigation. His testimony represents too slender a reed upon which to rest a conviction . . . "

It is put that the government's questions or rather colloquy before the grand jury should have been specific, concrete and confronted the petitioner with the substance of what Dubler and Aronowitz told the government and should have given the full names of the borrowers to the petitioner. The petitioner did tell the grand jury that he loaned money and gave the first names of borrowers. At this phase the government should have specifically asked the petitioner about Dubler and Aronowitz, the loans to them, the repayment and also the time or times of the loans.

At the very least the responses of the petitioner before the grand jury were technically true.

In *Bronston v. U.S.*, 409 U.S. 352 (1973) the petitioner committed perjury under 18 U.S.C. 1621 in a bankruptcy proceeding. It was held that Section 1621, the perjury

statute, was not violated even though the responses were technically true but unresponsive. It was held that the statute was not violated where the answers evidenced an intent to mislead the interrogator. It was stated in part on pages 357 and 358 that:

> ". . . but we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true."
>
> ". . . We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason who Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures, intentions of interrogations, it is not uncommon for most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it . . . "

It was further continued on pages 358-359 that:

> ". . . If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."
>
> ". . . A jury should not be permitted to engage in conjecture, whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe his answer to

> be true'. To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know . . . "

It was further stated in part on page 360 that:

> ". . . The cases support petitioner's petition that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry . . . "

The petitioner's statements that he couldn't recollect were at most his opinion as to a state of mind, not testimony as to facts. See *U.S. v. Esposito,* 358 F. Supp. 1032, (D.C.N.D., Ill., 1973) at pages 1033, 1034, the court stating in part that:

> "The second question did result in an unresponsive answer which was therefore ambiguous. Thus its literal untruthfulness cannot be determined. Since the answer was ambiguous and at most answered a question which had not been asked, the defendant cannot be found guilty of perjury . . . "
>
> "The third question was propounded in an attempt to resolve the ambiguity but the defendant's answer was evasive: "I don't believe I have ever seen him there." This was not a direct answer to the question and is merely a statement of defendant's state of mind."

In *U.S. v. Camporeale,* 515 F. 2d 184 (Cir. 2d, 1975), the court held that a prosecutor questioning a person before the grand jury had no duty to divulge to such person any independent proof in relation to the subject matter of the investigation. However, the Court also added at page 189 that:

". . . In any event the prosecutor in the present case acted fairly, advising Camporeale at the outset of his grand jury testimony that his 'activities had been under surveillance for a considerable period of time'."

Examining the testimony in this case and the indictment itself, it is very difficult to find that the petitioner lied before the grand jury. In regard to Aronowitz, it is interesting to note that while he testified he got an initial loan of $30,000 and paid over $100,000 it would have been interesting if this "interest" was ever deducted by Aronowitz from his income tax.

The holding in *Bronston, supra,* is even more applicable to the circumstances of a case such as this. In *Bronston,* there was a civil proceeding where it can be assumed that Bronston was entitled to be represented by counsel. In this case as well as similar cases, the witness or "target" of the grand jury investigation is closeted with the U.S. Attorney in the confines of the grand jury area. Obviously his counsel cannot be present. A statement in *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964) although placed in a different context, would seem to apply to the "witness" or "target" called before the grand jury even if immunized. That statement at page 55 in part reads as follows:

". . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . "

It is also suggested that what the prosecutor did in this case was to lay a trap for the appellant so that the ensuing indictment for false declarations could be had. At the very least there should have been a warning to the petitioner that he would be liable to be indicted in the light of his testimony which the prosecutor deemed to be untruthful.

In *U.S. v. Del Toro,* 513 F. 2d 656 (Cir. 2d, 1975) at page 665 it was stated in part:

"Kaufman appeared before the grand jury . . . He was advised of his privilege against self-incrimination and that he was a target . . . After he gave what the Assistant U.S. Attorney believed to be perjurious testimony, he was warned that he might be subject to a perjury prosecution and asked whether 'in the light of that warning' he wished to change his testimony . . . "

POINT III

THE COURT SHOULD HAVE GRANTED PETITIONER'S COUNSEL A CONTINUANCE TO THE NEXT DAY FOR THE PURPOSE OF DECIDING WHETHER THE PETITIONER SHOULD TESTIFY OR NOT AND ALSO FOR THE PURPOSE OF PREPARING FOR SUMMATION

This trial began on January 9, 1976 and concluded January 9, 1976(1). On January 9, 1976 counsel apparently asked the court at that time for a continuance, at 5:20 p.m. The court stated "it's half a day" (123). The court further told the defense counsel that the case "started late to accommodate counsel" (123). The petitioner's counsel stated that the defense needed time to decide whether the petitioner would testify (123). The court then gave counsel, and of course the petitioner, ten minutes to make this crucial decision (123). Shortly thereafter the petitioner rested (124). Nevertheless petitioner's counsel asked for the "evening to prepare the summation." The court denied the request, affording counsel ten minutes to prepare for

summation (158). Colloquy disclosed that the defense counsel also participated in a long enduring trial before Judge Cannella and apparently at the last phase of that case he had to appear before Judge Cannella thus causing this short delay in this case of an hour and a half (125).

Counsel further argued that in regard to this very case he completed all other aspects of the trial in a timely fashion (126). Further that there was no delay in regard to the cross examination because the court gave the defense counsel one-half hour to read the material furnished under 18 U.S.C. 3500 and that was the first time, the last day of trial (126). The Court concluded this phase of the trial by telling the defense counsel that the day was "young" and then directed the government counsel to sum up first, the defense counsel thereafter to sum up, and then affording the government counsel a brief period for rebuttal (126).

The failure to afford the petitioner ample time to exercise his right to present a defense by testifying prejudiced the petitioner. The right to testify is fundamental to a fair trial. See *Ferguson v. Georgia*, 365 U.S. 570. Further, the petitioner was confronted with the evidence at trial for the first time. Certainly it was not asking too much for the evening off to deliberate with counsel whether to exercise the important choice of not testifying or testifying, both constitutional rights. See *Harris v. New York*, 401 U.S. 222, 225.

The denial of the overnight continuance to make this important decision left the petitioner within the statement of the court in *U.S. v. Frank*, 494 F. 2d 145 (Cir. 2d, 1974) at page 153 where it was stated that:

> "In passing upon the sufficiency of the evidence, the court had only the prosecution's case, the defense having offered none . . . But the self-incrimination clause does not elevate a defendant's silence much less the failure to present any defense case, to the level of a convincing refutation. When a defendant has offered no case, it may be reasonable for the jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version . . . "

Realistically, in order for the petitioner to have testified, it would have been necessary to evaluate the testimony of the two witnesses who testified against him, analyze their testimony, and be prepared to offer a truthful defense. Affording counsel and his client ten minutes to make this choice, it is suggested, prejudiced the petitioner's right to exercise his constitutional right to testify, present a defense and enjoy a fair trial.

It is also contended that the court should have afforded counsel an overnight continuance to prepare a summation. It is to be noted under the recent practice, the prosecutor has two summations. Counsel for the petitioner was engaged simultaneously in the phase of another trial. In effect, counsel was trying two cases simultaneously; this case and his other case. Meanwhile this case involved merely "oath against oath" with the petitioner not testifying. It is suggested the right to sum up is a basic due process right as well as a right afforded a defendant in a criminal action under the 6th Amendment to the Federal Constitution. The petitioner had a right to effective counsel. The crucial phase of a criminal action is summation. As stated in *Herring v. New York*, 45 L. Ed. 2d 593, at page 598:

> "There can be no doubt the closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial . . . "

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED

Respectfully submitted,

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APPENDIX

The decision in the United States Court of Appeals was rendered off the bench. No decision has as yet been published.

Dated: July 16, 1976

There was no opinion rendered in the District Court.